IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 88 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MOHAMED IQBAL SON OF CHAND MOHAMED QURESHI

Versus

K R SEHGAL, SUPDTT. OF CUSTOMS

Appearance:

1. Criminal Revision Application No. 88 of 2001

MR G RAMAKRISHNAN for Petitioner No. 1

MR JS YADAV for Respondent No. 1

MR BD DESAI A.P.P.for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 22/02/2002

ORAL JUDGEMENT

1. This is a revision application under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (for short `the Code') challenging the judgment and

order recorded against the petitioner for the offence punishable under Section 135 of the Customs Act, 1962. The case of the original complainant against the present petitioner may be briefly stated as follows:-

2. The Customs Department had some previous information that the present petitioner would be arriving at Ahmedabad International Airport on 30/1/96 in the evening flight coming from Sharjah and he would be carrying gold either in his person or in his baggage. The petitioner actually arrived in the aforesaid flight on 30/1/96 from Sharjah at Ahmedabad International Airport. It was noticed that at initial stage he did not disclose that he was carrying gold with him. However, on account of the aforesaid information the petitioner was taken to the x-ray machine room. There also he did not initially admit that he was carrying gold with him. However, on further interrogation, he admitted that he had hidden four golden biscuits in his rectum. Thereafter, he was taken inside the room and he demanded water. After consuming some water, he extracted four golden biscuits from his rectum. Thereafter search was carried out with respect of his bag and it was noticed that there was a golden ring in the said bag. These articles were seized and statement of the petitioner under Section 108 of the Customs Act, 1962 (for short `the said Act') was also recorded. After following necessary procedure, a complaint was filed before the learned Additional Chief Metropolitan Magistrate, Ahmedabad. It was registered there as criminal case No.40/96. The learned Magistrate recorded the evidence and ultimately found that the present petitioner was guilty for the offence punishable under Section 135 of the said Act. Therefore, he convicted him for the said offence and sentenced him to suffer R.I. for four years. The petitioner was further directed to pay fine of Rs.10,000/- . In default of payment of fine, he was required to undergo further S.I. for six months. The learned Magistrate also directed that the punishment already undergone would be set off against the punishment awarded as aforesaid.

3. Feeling aggrieved by the aforesaid judgment and conviction order dated 24/8/2000 recorded by the learned Additional Chief Metropolitan Magistrate, Ahmedabad the petitioner preferred criminal appeal being criminal appeal No.58/2000 before the City Sessions Court, Ahmedabad. The learned Additional City Sessions Judge Court No.13, who heard the appeal, dismissed the same and confirmed the judgment and conviction order including the order of sentence of the learned Additional Chief

Metropolitan Magistrate. Feeling aggrieved by the said judgment and conviction order dated 19/12/2000, the petitioner has preferred this revision application before this Court.

4. The petitioner has contended here that there are mandatory provisions in Sections 102, 103 and 108 of the said Act and they have not been strictly followed by the complainant and, therefore, the conviction recorded against the petitioner is illegal. It is also contended that there was illegality in appreciation of evidence and, therefore, also the judgments and orders of the two Courts below are illegal and perverse and deserve to be set aside. The petitioner has prayed that the present revision application be allowed and the judgments and conviction orders recorded by the two Courts below be set aside. On receipt of the revision application, notice was issued at the first instance and rule was issued thereafter. In response to the service of rule, Mr.J.S. Yadav, learned Standing Counsel for the Union Government has appeared for respondent No.1 whereas learned A.P.P. Mr.B.D. Desai has appeared for respondent no.2 State of Gujarat. I have heard the learned counsels for the parties and have perused the papers. The learned counsel for the petitioner has argued the matter at length stating that the custom officer was required to follow the procedure laid down in Section 102 of the said Act before the search could be carried out. It is his argument that no procedure laid down in Section 102 of the said Act has been followed by the complainant and, therefore, search would stand vitiated and consequently the entire outcome of the search would also be vitiated. It is therefore his argument that once the search and seizure stand vitiated then the entire case of the complainant falls to the ground and there would be no incriminating material against the petitioner for convicting him for the offence punishable under Section 135 of the said Act.

5. On the other hand, the learned advocate for respondent No.1 has argued at length that there are two sets of provisions made in Section 102 as well as in Section 103 of the said Act. It is his argument that if the provisions of Section 103 of the said Act are applicable than in that event, provisions made in Section 102 of the said Act would not come into play.

6. In order to appreciate the aforesaid arguments advanced by the learned counsels for the parties, it would be necessary to refer the provisions made in Section 102 and 103 of the said Act and therefore they are reproduced for ready reference as follows :-

"Section 102.Persons to be searched may require to be taken before gazetted officer of customs or magistrate:-(1) when any officer of customs is about to search any person under the provisions of Section 100 or Section 101, the officer of customs shall, if such person so requires, take him without unnecessary delay to the nearest gazetted officer of customs or magistrate.

(2) If such requisition is made, the officer of customs may detain the person making it until he can bring him before the gazetted officer of customs or the magistrate.

(3) The gazetted officer of customs or the magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) Before making a search under the provisions of Section 100 or Section 101, the officer of customs shall call upon two or more persons to attend and witness the search and may issue an order in writing to them or any of them so to do; and the search shall be made in the presence of such persons and a list of all things seized in the course of such search shall be prepared by such officer or other person and signed by such witnesses.

(5) No female shall be searched by any one excepting a female.

Section 103. Power to screen or X-ray bodies of suspected persons for detecting secreted goods-(1) Where the proper officer has reason to believe that any person referred to in sub-section (2) of Section 100 has any goods liable to confiscation secreted inside his body, he may detain such person and produce him without unnecessary delay before the nearest magistrate.

(2) A Magistrate before whom any person is brought under sub-section (1) shall, if he sees no reasonable ground for

believing that such person has any such goods secreted inside his body, forthwith discharge such person.

(3) Where any such magistrate has reasonable ground for believing that such person has any such goods secreted inside his body and the magistrate is satisfied that for the purpose of discovering such goods it is necessary to have the body of such person screened or X-rayed, he may make an order to that effect.

(4) Where a magistrate has made any order under sub-section (3), in relation to any person, the proper officer shall, as soon as practicable, take such person before a radiologist possessing qualifications recognized by the Central Government for the purpose of this section, and such person shall allow the radiologist to screen or X-ray his body.

(5) A radiologist before whom any person is brought under sub-section (4) shall, after screening or X-raying the body of such person, forward his report, together with any X-ray pictures taken by him, to the magistrate without unnecessary delay.

(6) Where on receipt of a report from a radiologist under sub-section (5) or otherwise, the magistrate is satisfied that any person has any goods liable to confiscation secreted inside his body, he may direct that suitable action for brining out such goods be taken on the advice and under the supervision of a registered medical practitioner and such person shall be bound to comply with such direction:

Provided that in the case of a female no such action shall be taken except on the advice and under the supervisions of a female registered medical practitioner.

(7) Where any person is brought before a magistrate under this Section, such magistrate may for the purpose of enforcing the provisions of this section

order such person to be kept in such custody and for such period as he may direct.

(8) Nothing in this section shall apply to any person referred to in sub-section (1), who admits that goods liable to confiscation are secreted inside his body, and who voluntarily submits himself for suitable action being taken for bringing out such goods.

Explanation-For the purposes of this section, the expression "registered medical practitioner" means any person who holds a qualification granted by an authority specified in the Schedule to the Indian Medical Degrees Act, 1916 (7 of 1916), or notified under Section 3 of that Act or by an authority specified in any of the Schedules to the Indian Medical Council Act, 1956 (102 of 1956).

7. On a bare reading of Section 102 and Section 103 of the said Act it would clearly reveal that so far as Section 102 of the said Act is concerned, a person to be searched may be required to be taken before the Gazetted Officer of Customs or Magistrate as required in the provision in Section 102. On the other hand Section 103 itself provides for the power to screen through X-ray, bodies of suspected persons for detecting hidden goods. In the present case we find that since there was previous information that the petitioner had concealed gold inside his person or in his baggage, in order to find out if something has been hidden inside the person of the petitioner, it was necessary for the custom department to take the petitioner to x-ray machine room for x-ray screening of the person of the petitioner and, therefore, it appears that the officer of the customs department had opted to take the petitioner for x-ray screening in accordance with the provisions made in Section 103 of the said Act.

8. Therefore when the procedure of Section 103 was adopted and when the officer had actually taken the petitioner to the x-ray machine then in that event, in my opinion, it would not be necessary for the complainant to go by the procedure laid down in Section 102 of the said Act. In my opinion, provisions made in Section 102 of the said Act would come into play only if the physical search of the person of the suspected person is required

to be carried out. On the other hand, if physical search or clinical search is not required to be carried out and if the body is required to be X-rayed then in that event, the officer would be required to follow the procedure laid down in Section 103 of the said Act and when the procedure laid down in Section 103 of the said Act is required to be followed then in that event, the procedure prescribed in Section 102 of the said Act will not be required to be followed.

9. I am therefore, of the opinion that Section 102 and 103 of the said Act operate in separate fields. Section 102 would apply only when personal search of the body of the suspected person is required to be carried out. On the other hand, Section 103 of the said Act will apply when the body of the suspected person is required to be x-rayed. In the present case, the customs officers have opted to go for x-ray examination of the body of the petitioner and, therefore, they had to follow the procedure laid down in Section 103 of the said Act. In that view of the matter, Section 103 of the said Act would prevail over Section 102 of the said Act. Therefore, it cannot be said that the entire proceedings stand vitiated for having not observed the provisions made in Section 102 of the said Act. It has also been argued that even at the stage of Section 103 of the said Act, the complainant was required to follow the provisions made in sub-section 2,3,4, etcs., of Section 103 of the said Act. It is also his argument that these provisions have not been followed by the customs officers and, therefore, also the entire proceedings would stand vitiated and consequently the entire criminal proceedings before the Court had also vitiated.

10. It is not much in dispute that the provisions made in sub-section 1,2,3,4,5, etcs., of Section 103 of the said Act have not have been followed by the custom department. In the present case, however, the learned advocate for respondent No.1 has argued that under sub-section 8 of the section 103 of the said Act, if the person referred to in sub-section (1) admits that goods liable to confiscation are secreted inside his body and if he voluntarily submits himself for suitable action being taken for bringing out such goods then in that event the provisions made in sub-section 1 to 7 of Section 103 of the said Act would not apply and the procedure laid down therein need not be followed.

11. In the present case, we find that right from the beginning it has been stated in the complaint itself, that when the petitioner was taken to x-ray machine room,

for the purpose of carrying out procedure laid down in Section 103 of the said Act, the petitioner did not admit anything at the first instance. However, he was further interrogated and on being questioned, he admitted that he had hidden four golden biscuits in his rectum. Therefore it is clear that before any procedure laid down in Section 103 of the said Act could be followed, the petitioner admitted that he had secreted the said gold in his rectum and in accordance with sub-section 8 of the Section 103 of the said Act. Therefore, in view of sub-section 8 of Section 103 of the said Act, it was not necessary for the complainant to follow the procedure laid down in sub-section 1 to 7 of Section 103 of the said Act.

12. The learned advocate for the petitioner has argued at length that in fact no such admission was made voluntarily by the petitioner at that point of time and it was a forced statement and therefore it could not be acted upon. The two Courts below have recorded a finding of fact that this was a voluntary statement made by the petitioner before the customs officer and, therefore when the statement is voluntary, it cannot be said to have been made under coercion, fraud or undue inducement. Therefore in view of sub-section 8 of Section 103 of the said act, the custom officer was not required to follow the procedure laid down in sub-section 1 to 7 of Section 103 of the said Act. In that event the complainant was not obliged to follow the procedure laid down in sub-Section 1 to 7 of Section 103 of the said act. Therefore, merely because the said procedure has not been followed, it cannot be said that the proceedings undertaken by the complainant would stand vitiated. The two Courts below have recorded findings of fact that the statement of the petitioner recorded by the concerned officer of the customs department and produced before the Trial Court at Exh.43 is genuine, voluntary and the same has not been made under fraud, coercion or undue inducement and, therefore it can be relied upon. In view of the aforesaid finding of fact recorded by the two Courts below there is no reason for this Court to differ from the view adopted by the two Courts below, on the aforesaid finding of fact. This is after all revisional jurisdiction and the powers, function and jurisdiction of this Court exercising revisional jurisdiction are very limited and restricted. Even when the Court hears the appeal then also the Court would naturally give due weightage to the finding of fact recorded by the Trial Court. The reason is that the trial Court had every opportunity to witness the witnesses giving evidence from the witness box. The Trial Court will have the

opportunity to record the demeanor of the witnesses while giving evidence from the witness box. In the present case, the appellate Court also exercised its powers to reappreciate evidence recorded by the Trial Court. Here we are required to consider the evidence for the third time. In that view of the matter, the revisional Court will have very limited scope for interference with the findings of fact recorded by the two Courts below. In the present case it is found that the two Courts below have applied their mind while recording findings of fact and, therefore, it cannot be said that the findings of fact recorded by the two Courts below are illegal and perverse. When the findings of fact are not found to be illegal and perverse and when there are concurrent findings of facts recorded by the two Courts below it would not be open for this Court to interfere with the said finding of fact while exercising revisional jurisdiction.

13. It has also been contended that before recording the statement under Section 108 of the said Act, the concerned officer of the customs department was obliged to issue summons to the petitioner. It is also the argument of the learned advocate for the petitioner that in the present case no such summons has been issued and, therefore, the petitioner could not avail of the opportunity, which would otherwise be available to him on receipt of summons in accordance with the provisions made in Sub-section 1,2 and 3 of Section 108 of the said Act.

14. The learned advocate for respondent No.1 has argued in reply that question of issuance of summons may come into play if the person concerned, whose statement is required to be recorded, is not present before the officer. In the present case it is found that the petitioner was already present before the officer who was required to record his statement and, therefore, the question of issuance of summons would not arise. Apart from that the said argument and finding when the person concerned whose statement is required to be recorded under Section 108 of the said Act is present before the authorised officer intending to record his statement then in that event it is not an obligation on the part of the said officer to first issue summons and then to record the statement. In other words the statement recorded under Section 108 of the said Act would not stand vitiated if it is recorded without issuance of summons as per Section 1 and 2 of Section 108 of the said Act. In the present case, it is not much in dispute that the statement of the petitioner was recorded without issuing summons under Section 108 (1) or 108 (2) of the said act.

However, the petitioner was already present before the officer concerned and the officer who recorded the statement Exh.43 of the petitioner was competent to record the statement. In that view oft he matter, the statement recorded under Section 108 of the said Act can be relied upon if it is found to have been voluntarily made. On this aspect, as said above, there are concurrent findings of fact recorded by the two Courts below that the statement of the petitioner is voluntary in nature and, therefore, it is admissible in evidence. As said above are the concurrent findings of fact and there is no reason to differ from the view adopted by the two Courts below.

15. It has also been argued that before recording the confessional statement under Section 108 of the said Act, the said officer was required to follow the procedure laid down in Section 164 of the said Code. Now it is very clear that Section 164 of the said Code provides for recording of confessional statement of accused person. This means that the magistrates empowered by Section 164 of the said Code to record confessions, are aware in the beginning that they are required to record confessions of accused person. On the other hand when a statement of a person is required to be recorded under Section 108 of the said Act, it would not be known whether it would be a confessional statement or not. It is only after the recording of statement that the authority recording the statement would come to know as to whether it contains some confessional part or not. There may or may not be any confessional part. The provisions made in Section 108 of the said Act and in Section 164 of the said Code are therefore not comparable. Precautions are required to be taken before recording confession of the accused persons under Section 164 of the said Code, since the magistrate knows in advance that he is going to record confession of the accused. Than the officer producing the accused before the magistrate also knows that he is presenting the accused to a magistrate so that the magistrate could record the confession of the accused. Same way, even the accused so produced before the Magistrate would also know that he wanted to make a confession and hence he was being produced before a magistrate so that he could make a confession and the magistrate could record the same. In that view of the matter, everybody knows in advance that a confession is going to be recorded or is required to be recorded. While recording a statement under Section 108 of the said Act, nobody knows as to what is going to be the outcome of the statement to be made by a person under Section 108 of the said Act. Therefore no such precaution is

required to be taken by the officer empowered to record the statement under Section 108 of the said Act before commencement of such a statement.

16. It is also required to be seen that the procedure to be followed by a magistrate for recording confession under Section 164 of the said Code has been laid down in Sub-section 2 of Section 164 of the said Code. Than sub-section 3 and sub-section 4 also require the procedure to be followed by a Magistrate before and after recording confession of an accused person. No such procedure is shown to have been laid down in Section 108 of the said Act. Therefore there is a basic difference between the operation of Section 108 of the said Act and Section 164 of the said Code. Therefore the provisions made in Section 164 of the said Code cannot be read or protected in Section 108 of the said Act. The Court has to follow the procedure laid down in/and under which the Court is functioning. Therefore non-observation of the provisions made in Section 164 of the said Code, while recording the statement under Section 108 of the said Act, cannot vitiate such a statement recorded under Section 108 of the said Act and the conviction recorded in the said proceedings before the two Courts below on a consideration to the said statement under Section 108 of the said Act cannot be termed as illegal on this aspect of the case.

17. The learned advocate for the petitioner has relied upon a decision of of Babu v. State of Kerala reported in A.I.R. 1999 S.C.3861. There it was observed that in Section 50 of the N.D.P.S. Act, 1985 provisions have been made for search and seizure. The Hon'ble Supreme Court also found that the brown sugar was recovered from the person of accused and when the accused was not informed by Police Officer that he had a right to be searched in presence of a magistrate or a Gazetted Officer then it has to be held that the provisions of Section 50 of the N.D.P.S. Act 1985 have not been complied with and, therefore, the conviction of the accused was liable to be set-aside since the said provisions were held to be mandatory.

18. Now as said above, had it been the matter covered by Section 102 of the said Act than probably the petitioner could have raised this plea and would have been able to show this judgment successfully. In the present case, the facts of the case fall in Section 103 of the said Act and particularly in sub-section 8 of the section 103 of the said Act and, therefore, the provisions made in Section 102 of the said Act would not

be attracted. The provisions made in Section 102 of the said act appear to be similar to the provisions made in section 50 of the N.D.P.S. Act, 1985. Therefore, the said decision of the Hon'ble Supreme Court could help the present petitioner only if his case had fallen in Section 102 of the said Act. Another decision also of the Hon'ble Supreme Court in case of State of Punjab v. Baldev Singh reported in A.I.R. 1999 S.C. 2378 also refers to the said principle. It seems that the two decisions have been based on the identical facts. As said above, the above are not the facts before us. Since the case before us falls in Section 103 of the said Act and not in Section 102 of the said Act, the principle laid down in the aforesaid two decisions will not come to the rescue of the petitioners to any extent.

19. On factual merits, the complainant has tendered oral evidence at Exh.34. His evidence gets supports from his complaint and then the panch witness Exh.57 has also supported the evidence of the complainant and his complaint. Panchnama Exh.59 also supports the said evidence. All these pieces of evidence get further corroboration from the statement of the petitioner Exh.43 recorded by the competent authority under Section 108 of the said Act. The cumulative effect of this evidence leads us to a conclusion and only one conclusion that the petitioner did not admit of his possession of gold biscuits, and a golden ring at the beginning. Even when he was taken to X-ray machine, he maintained his stand. However, on a further questioning he admitted that he had concealed four gold biscuits in his rectum. He also showed his readiness to take them out. He called for water and took out those 4 gold biscuits from his rectum. A golden ring was also found from his bag. So, this undisclosed gold was found out from him. He had not paid duty on the same. He had not declared his possession in respect of the gold till he was finally questioned. Thus he committed an offence punishable under Section 135 of the Act. Looking to the evidence as aforesaid, there is no room to doubt the evidence. The two Courts have properly appreciated this evidence. The witnesses have stood the test of cross-examination and their evidence has not at all been shaken during the course of cross-examination. The two Courts below have thus not committed any illegality in relying upon the said evidence on record and in finding that the aforesaid gold was found in person of the petitioner for which he neither made any disclosure nor did pay customs duty and thus committed offence punishable under Section 135 of the said Act.

20. It has also been argued that independent witness namely Faruque Mohmad was not examined. Now the witness who is shown to be an independent witness is found to be a witness who had asked the petitioner to approach Mohmad Unus at Sharjha for bringing the gold in question to India. It is found that when the case has been proved on facts and when the evidence of the complainant Exh.34 has been fully supported by the evidence of panchnama Exh.59, and the evidence of panch witness Exh.57 and when it has been further supported by the statement of the petitioner Exh.43, voluntarily made before the competent officer under Section 108 of the said Act, it would not be necessary for the prosecution to examine other witnesses and, therefore, non-examination of the said witness does not go to the root of the case of the prosecution. Moreover, the evidence of the said witness would not prove as to whether or not the gold biscuits were actually recovered from the rectum of the petitioner by the aforesaid process, in presence of the officers of the customs department and panch witness Pratapbhai Exh.57. Therefore for proving the fact in question, examination of the aforesaid witness was not a must.

21. In that view of the matter, it is quite clear that the petitioner was rightly held guilty for the offence punishable under Section 135 of the said Act. He was found in possession of four golden biscuits and one golden ring and had not paid duty for bringing them to India. He had not disclosed that he had brought this gold with him. In the instant case he did not disclose the the said fact at two occasions and when he was questioned thoroughly, he admitted the fact and brought out golden biscuits from his rectum. Than during the course of search of his bag, a gold ring was also seized from the said bag. In that view of the matter, the Trial Court was justified in convicting the petitioner for the offence punishable under Section 135 of the said Act and the Sessions Court, in turn was, justified in dismissing the appeal of the petitioner and confirming the judgment and conviction order of the Trial Court. The judgments and conviction orders of the two Courts below are therefore not found to be illegal and perverse and, therefore, it is not open to this Court to interfere with the said judgments and conviction orders of the said Courts in exercise of revisional jurisdiction.

22. The learned advocate for the petitioner has lastly argued that the punishment is too harsh, having regard to the facts and circumstances of the case.

23. At this stage it has to be taken into account

that the provision made in Section 135 of the said Act provides for the punishment of the offence in question which shows that in case of offence related to any of the goods to which Section 103 applies and the market price whereof exceeds one lakh of rupees, the accused would be punishable with imprisonment for a term which may extend to seven years and with fine. The law further shows that in the absence of adequate reasons to the contrary to be recorded in the judgment of the Court such imprisonment would not be for less than three years. Here the value of gold in question is above Rs.one Lakh. The petitioner has been sentenced to suffer R.I. for four years. When the law itself shows that punishment cannot be less than three years, the punishment of four years cannot be said to be too harsh. Here we have to consider the manner in which the offence has been committed. The petitioner had hidden gold biscuits in his rectum and he extracted them out only when he was almost compelled to do so by taking him to x-ray machine room. At that time he must have been sure that the gold biscuits in his rectum would be displayed on the screen of the x-ray machine and, therefore, he must have agreed to extract it out from his person. Looking to the modus operandi, it would not be proper for this Court to show any leniency to the petitioner. The learned advocate for the respondent has also argued that as per passport, the petitioner had frequently moved out of India and he appears to be a regular smuggler. In absence of any further material on record, it is not necessary or proper to go into this argument. However, the fact remains that looking to the modus operandi it would not be proper to reduce the sentence since the sentence cannot be said to be too harsh.

24. Smuggling of foreign mark articles, including gold in gold biscuits form, by itself is an anti-national activity. It adversely affects nation's economy. Therefore, strict provisions are made for the offences under the said Act. This would show that no lenient or liberal view should be taken by this Court in such offences. It is more so when the case has been contested on facts and on law before atleast three Courts unsuccessfully. The request for reducing jail sentence, therefore, cannot be accepted.

25. In that view of the matter there is no merit in the present revision application and hence it deserves to be dismissed.

For the foregoing reasons, this revision application is ordered to be dismissed and judgment and

conviction orders of the two Courts below are confirmed.
Rule is discharged.

(D.P. Buch, J.)

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